Supreme Court, U.S.
FILED
MAY 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1256

In the Supreme Court of the United States

OCTOBER TERM, 1987

HYDROGEN TECHNOLOGY CORP., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the courts below erred in dismissing its Federal Tort Claims Act suit on the ground that the Federal Bureau of Investigation (FBI) acted with due care while investigating whether petitioner's founder had fraudulently deceived investors by claiming that he had devised a method to heat homes ultra-economically.

1. In the late 1970s, Ambrose Hartnett, petitioner's founder, claimed to have invented a virtual perpetual motion method of generating hydrogen from a small quantity of iron shavings and a large amount of water. He claimed that he could develop a hydrogen generating machine that could attain a 7,000-degree Fahrenheit temperature and could be used to heat an average home for about 23 cents per month. Harnett persuaded a number of persons to invest a total of $415,000 so that he could develop a prototype hydrogen generating device, which he falsely claimed a French corporation had agreed to buy for $10

million. After the investors became anxious because no prototype was forthcoming, Hartnett explained that he was incorporating various special materials, including ceramic, silver, nickel, sapphire, and titanium, into the core of the device so that it could withstand the very high temperatures that were critical to its operation. In January 1982, he displayed a prototype and staged a test firing, which he claimed was successful. When Hartnett failed to conduct another test two months later, the prototype was taken into the possession of one of the investors. Pet. App. 2-6.

Hartnett's promotional activities were investigated by the Fort Wayne, Indiana, office of the FBI beginning in 1981, concerning possible violations of the wire fraud statute, 18 U.S.C. 1343. The FBI contacted Dr. Fred Gornick, a professor at the University of Maryland affliated with the Department of Energy who had a special background in the chemistry of hydrogen energy, and asked him to evaluate Hartnett's claims. Gornick informed the FBI that "while the production of hydrogen from iron and water is a well-known chemical reaction, many of Hartnett's claims were incredible" (Pet. App. 5). In particular, he said that no known substance could withstand the temperature Hartnett claimed the machine would generate and that Hartnett was essentially claiming to have produced "a perpetual motion machine, in violation of the First Law of Thermodynamics" (*ibid.*).

In the fall of 1983, after the FBI was informed by the United States Attorney that he was declining prosecution based primarily on insufficient evidence, the FBI obtained possession of the prototype and turned it over to Gornick for examination. Among other matters, the FBI requested that the prototype be examined to determine whether the core in fact contained the special materials that Hartnett

claimed. In order to do so, Gornick dismantled the prototype and found that it contained no such materials. He also determined that it would consume at least nine tons of iron a year if used to heat an average home. The dismantled unit was subsequently returned to the investors. Pet. App. 5-8.

2. Petitioner then brought this suit under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, alleging that the investors had suffered more than $50 million in damages because Gornick had dismantled the prototype (Pet. App. 8). Section 1346(b) provides that the United States is liable "for injury or loss of property * * * caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment." After reviewing 61 documents (Pet. App. 18), which included all the evidence petitioner would have sought to introduce at trial other than evidence relating to damages (*id.* at 16), the district court granted the government's motion for summary judgment. It concluded that "there is no evidence that the F.B.I. took any step that was unreasonable, unnecessary, or excessive" (*id.* at 24). It held (*id.* at 23) that petitioner's claim "is barred by the exception defined in 28 U.S.C. § 2680(a)" barring claims "based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid."

The court of appeals affirmed (Pet. App. 1-16). It found, as had the district court, "that a dismantling of the generator was a reasonable, even necessary, element of the investigation" and that it was "unable to find anything in the record which indicates that the FBI acted other than with due care" (*id.* at 15). Noting that "if the generator were really the technological breakthrough that it was

claimed to be, [petitioner], having already developed a design, could easily have built a new prototype generator," the court held "that the FBI did not act negligently and that the government is immune under 28 U.S.C. § 2680(a)" (*ibid.*). It added that, although whether a defendant acted wrongfully is normally resolved through a trial, there was no error in finding that the FBI acted without fault here as part of summary judgment proceedings since there was no dispute as to the material facts and the judge had examined all the evidence petitioner intended to introduce at trial relating to liability (*id.* at 16).

3. There is plainly no merit to petitioner's claim. It was reasonable for the FBI to ask Gornick to examine the prototype, even though a United States Attorney had previously declined to prosecute Hartnett, because that declination was based primarily on insufficient evidence of wire fraud (Pet. App. 13 n.7). As both courts below concluded (*id.* at 15, 24), it was necessary for Gornick to dismantle the prototype generator to evaluate Hartnett's claims, particularly the claim that there were special materials in the core that could withstand extremely high temperatures. Governmental activity not infrequently necessitates some interference with property rights, but under Section 1346(b) there is no basis for an action under the Federal Tort Claims Act in the absence of negligent or wrongful conduct on the part of the government. For example, in *Laird* v. *Nelms,* 406 U.S. 797 (1972), this Court held that persons who suffered property damage resulting from sonic booms caused by military aircraft on a training mission could not obtain relief under the Act because there was no showing of negligent or wrongful conduct by the military.

In this case both courts below concluded (Pet. App. 15, 24) that the FBI committed no negligent or wrongful

act as required by Section 1346(b). Since the United States has not waived sovereign immunity for tort suits alleging liability without fault (*Laird* v. *Nelms*, 406 U.S. at 799; *Dalehite* v. *United States*, 346 U.S. 15, 45 (1953); *Borquez* v. *United States*, 773 F.2d 1050, 1052 (9th Cir. 1985); 2 L. Jayson, *Handling Federal Tort Claims: Administrative and Judicial Remedies* § 214.04 (1988)), there is no basis for liability. Moreover, as the court of appeals stated (Pet. App. 16), while claims that a defendant acted wrongfully are normally resolved through a trial, there was no prejudicial error here where the judge, the ultimate decision-maker since jury trials are not authorized under the FTCA, had examined all the relevant evidence before granting summary judgment.[1]

Because the government did not act negligently or wrongfully, it does not matter whether the courts below correctly concluded that the "due care" exception of Section 2680(a) bars petitioner's claim. That infrequently-invoked exception appears only to make clear that a government agent does not act wrongfully when he acts with due care while implementing a statute or regulation, even though the statute or regulation is subsequently determined to be invalid, so that FTCA tort suits may not be used to challenge the legitimacy of statutes and regulations. See *Dalehite*, 346 U.S. at 33; *Borquez*, 773 F.2d at 1052; *Powell* v. *United States*, 233 F.2d 851, 854 (10th Cir.

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[1] Since there was no wrongful act, this case is plainly distinguishable from *Hatahley* v. *United States*, 351 U.S. 173, 181 (1956), where the Court found that government agents who sold and destroyed horses and burros owned by Navajo Indians acted wrongfully because they did not show even a "minimal concern for the rights of others." Petitioner's contention (Pet. 9) that the FBI similarly disregarded the rights of the investors is wrong and, as an attempt to relitigate the factual findings of two lower courts (Pet. App. 15, 24), plainly does not warrant review by this Court.

1956); L. Jayson, *supra*, § 247. But where an employee or agent of the government acts reasonably and with due care within the meaning of Section 2680(a), it is plain that he commits no negligent or wrongful act within the meaning of Section 1346(b), and whether a claim is held to be barred by Section 1346(b) or Section 2680(a) is of little or no consequence.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

MAY 1988

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[2] Contrary to petitioner (Pet. 8-9), review is not warranted to resolve a conflict between the decision below and the decisions in *Carlyle* v. *United States*, 674 F.2d 554 (6th Cir. 1982), and *Stewart* v. *United States*, 199 F.2d 517 (7th Cir. 1952), as to whether the plaintiff or the government bears the burden of proving whether an exception to the FTCA bars suit. Where the burden was placed did not affect the outcome of this case because both courts below concluded that the government plainly acted without fault (Pet. App. 15, 24). Nor did it affect the outcome in *Carlyle* since the court, while appearing to place the burden on the government (674 F.2d at 556), concluded that the discretionary function exception barred the suit. The court in *Stewart* did not discuss which party had the burden of proving whether an exception to the FTCA barred suit, but instead held that the government had waived a defense it sought to raise after trial. That court's conclusion that the FTCA defenses are not jurisdictional in nature was rejected by this Court the next year in *Dalehite* (346 U.S. at 24). See 1 L. Jayson, *supra*, § 190.03.

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